No. 78293-8

MADSEN, J. (concurring)—I concur in the majority's conclusion that under RCW 35.99.060(3)(b), the phrase "additional incremental cost of underground compared to aerial relocation" means the difference between the actual aerial to underground cost less the estimated amount that aerial to aerial relocation would cost. Accordingly, I agree with the majority's answer to the second certified question.

However, the majority's answer to the second certified question makes it unnecessary, under the facts of this case, to answer the first certified question. Because Quest owns 21 of the poles along the highway where the city of Kent required underground relocation, there is no dispute that under any proposed construction of the term "aerial supporting structures" Quest has an ownership share in the aerial supporting structures. Thus, it is immaterial in this case how that ownership share is determined because under the statute's plain language the additional incremental cost of relocation must be paid if the telecommunications

company has such an ownership share.

When the court unnecessarily construes a statutory term, its construction is dicta. In *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 967, 977 P.2d 554 (1999), for example, the court declined to follow its construction in a prior case of the term "juvenile" in RCW 46.20.265(1) as limited to persons 13 to 18 years of age. The court concluded the construction was dictum because there was no question that the parties in the prior case, who were all under 18, were juveniles. *Id*. Similarly, in *Gilbert v. Sacred Heart Medical Center*, 127 Wn.2d 370, 376, 900 P.2d 552 (1995), the court noted that the court's discussion in a prior case of the one- and three-year limitations period in RCW 4.16.350 was dicta, since the issue in the prior case involved the eight-year limitations period in the statute.

Here, the majority's construction of the term "aerial supporting structures" in RCW 35.99.060(3)(b) is dicta because, as noted, there is no question that Qwest has an ownership share in aerial supporting structures under any definition of the term. Accordingly, the majority's discussion of the first certified question lacks precedential value.

Moreover, "'[p]rinciples of judicial restraint dictate that if resolution of an issue effectively disposes of a case, we should resolve the case on that basis without reaching any other issues that might be presented.'" *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 68, 1 P.3d 1167 (2000) (quoting *State v.*

*Peterson*, 133 Wn.2d 885, 894, 948 P.2d 381 (1997) (Talmadge, J., concurring)); *see*, *e.g.*, *Harbour Vill. Apartments v. City of Mukilteo*, 139 Wn.2d 604, 617, 989 P.2d 542 (1999); *State v. Blackwell*, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993); *In re Dependency of Penelope B.*, 104 Wn.2d 643, 660, 709 P.2d 1185 (1985). The court should follow this precept in this case.[1]

Finally, the parties touch on a number of factors that might affect the legislative decision whether a company should be reimbursed for relocating telecommunications facilities, and to what extent. The city contends that the legislature could not have intended that the same reimbursement amount was intended in the case of a company owning only 1 of 100 existing poles as in the case of a company owning all 100 poles. The city raises the specter of a telecommunications company installing a single pole in an area in order to assure full future reimbursement should a city require underground relocation. Quest insists, however, that the costs of underground relocation are not proportional to the number of poles owned, and that replacement of an aerial plant is de minimis compared to the cost of installing new facilities underground. Quest also says that neither the telecommunications company nor its customers benefit from aerial-to-

[1] Whether to answer a certified question pursuant to chapter 2.60 RCW is within the court's discretion. *Broad v. Mannesmann Anlagenbau, A.G.*, 141 Wn.2d 670, 676, 10 P.3d 371 (2000); *accord*, *e.g.*, *Fluor Hanford, Inc. v. Hoffman*, 154 Wn.2d 730, 736, ¶ 4, 116 P.3d 999 (2005); *Hoffman v. Regence Blue Shield*, 140 Wn.2d 121, 128, 991 P.2d 77 (2000), *overruled in part on other grounds by Wash. Indep. Tel. Ass'n v. Wash. Util. & Transp. Comm'n*, 148 Wn.2d 887, 64 P.3d 606 (2003); *see* RAP 16.16(a).

underground relocation and, in fact, the company is forced to waste functional aerial plant. The city disputes this, pointing out that the telecommunications company may be able to pull and reuse existing, expensive poles. The parties' briefing also suggests that a telecommunications company will benefit over time from underground relocation because maintenance costs are lower for underground facilities than for aerial facilities. All of this suggests that the court should proceed cautiously and decline to construe any portion of RCW 35.99.060(3)(b) that is unnecessary to decide this case.

It is apparent there are concerns particular to the industry, as well as significant policy considerations underscoring the legislature's decision to provide for reimbursement when facilities are relocated underground. Since the statutory language is clear as to the second certified question, and that clarity disposes of this case, the court should go no further. This court lacks the authority, the resources, the procedures, and complete information possessed by or available to the legislature, all of which would be necessary to adequately weigh competing interests and decide how reimbursement should be determined. If the legislature intended a different result, it should amend the statute.

AUTHOR:
Justice Barbara A. Madsen

WE CONCUR:

Justice Mary E. Fairhurst

Justice Richard B. Sanders